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No. 80-5227

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

CHERYL MAFFEY

v

STATE OF OREGON ex rel JUVENILE
DEPARTMENT OF KLAMATH COUNTY

On Appeal From the Court of Appeals of Oregon

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Appellant opposes the Appellee's Motion to Dismiss or Affirm and herein addresses the points raised by Appellee in the Order presented in the Motion.

JURISDICTION

Appellee reformulates the question presented and suggests Appellant's Jurisdictional Statement should be treated as a Petition for Writ of Certiorari.

The Trial Court, in its opinion, clearly and unambiguously stated it found by a preponderance of evidence that Appellant would be unable to change or adjust her homelife. (p. 15, Appendix A, Jurisdictional Statement). In so doing the Court sustained against due process challenge the provisions of the Oregon Statute permitting termination of parental rights for a preponderance of evidence. With the record plain that the Court based its decision on the preponderance standard, Appellant submits it is not germane to the question of jurisdiction that the Trial Court, in an afterthought, indicated it believed it could state by clear and convincing evidence. (p. 15, Appendix A, Jurisdictional Statement).

A SUPPLEMENTAL STATEMENT OF THE CASE

Dr. McCook, a psychiatrist and witness for the Juvenile Department, testified he concluded, on the basis of a less than one hour interview, Mrs. Maffey suffers from chronic schizophrenia. (Tr. 318, 324). He further testified the prognosis for Mrs. Maffey is that there is a substantial likelihood she will experience the recurrence of an acute psychotic episode requiring extended hospitalization within one year to eighteen months. (Tr. 324-328). He added her prognosis would be significantly better if she suffered from borderline personality. (Tr. 431, 432). Dr. Ball was Mrs. Maffey's treating psychiatrist for the seven months prior to trial. (Tr. 345). He

testified Mrs. Maffey suffered from a borderline personality pattern, (Tr. 346, 347) and her prognosis was favorable enough to permit her to be an adequate parent. (Tr. 350, 363, 391). The Trial Court concluded Appellant does not suffer from chronic schizophrenia. (pp. 6, 13, Appendix A, Jurisdictional Statement). During the three years preceding trial Mrs. Maffey was hospitalized an average of one to two times per year with the longest hospitalization lasting two weeks and the average stay being three to four days. (Child's Exhibit 9). Mrs. Maffey's caseworker, Mr. Lawson, testified she "tries very hard" to be a good person, has a "very infectious laugh," does not have the "intent" to do things harmful to her children, has a "strong desire" to be a good mother, "is a good housekeeper," meets the "physical needs" of her children and the "emotional needs, somewhat." (Tr. 847, 848, 861). Mr. Lawson testified also Mrs. Maffey can function adequately with support groups present. (Tr. 897, 898). He opined such a group would be a small group willing to work with Mrs. Maffey daily, making Mrs. Maffey the "focus of a lot of energy," with one or more of the group available daily at any time with professional counseling available, with friends giving love and emotional support. (Tr. 898, 899). Three witnesses for Mrs. Maffey, all employees of the Urban Indian Program (Carole Edmo, Christine Peterson and Cecilia Fisher) testified such a group was available to Mrs. Maffey in Portland, Oregon, at the time of trial on an indefinite basis. (Tr. 910-935, 976-992, 1046-1059). A fourth witness, Phil Perillat, testified Mrs. Maffey had not had the benefit of such a group while living in Klamath Falls, Oregon. (Tr. 1080-1091). The Trial Court, in its findings, stated Mrs. Maffey could care for the physical needs of the child, but not the emotional needs. (pp. 5, 6, Appendix A, Jurisdictional Statement). The Court added it could not make its finding by a beyond a reasonable

doubt standard. (See pp. 15, 16, Appendix A, Jurisdictional Statement).

ARGUMENT

Appellee cites Durley v Mayo, 351 U.S. 277, 281 (1956) for the proposition jurisdiction in this Court does not vest when the highest court of the State delivers no opinion and it appears the judgment might have rested upon an adequate non-federal ground. Durley, supra, should not be determinative in this case.

> Whether the decision of the State Court rested on a determination of the federal question is a federal question this Court is to decide after a review of the case record.
>
> (I)t must appear affirmatively from the record, not only that the federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause. (Citations omitted). Whether these requirements have been met is itself a federal question. . . That determination must rest upon an examination of the record. (Emphasis added). Honeyman v Hanan, 300 U.S. 14, 18, 19, 81 L.Ed. 476, 479.

Thus this Court has reviewed the record to determine if the State Court decision rested on an adequate state ground thereby rendering decision of the federal question unnecessary, Konigsberg v State Bar of California, 353 U.S. 252, 1 L.Ed.2d 810, 77 S.Ct. 722, to determine whether a federal question was sufficiently and properly raised in the State Courts, Street v New York, 394 U.S. 576, 22 L.Ed.2d 572, 89 S.Ct. 1354, and to determine if the asserted state grounds were substantial or sufficient. Williams v Kaiser, 323 U.S. 471, 89 L.Ed. 398; Magwire v Tyler, 8 Wall. (U.S.) 650, 19 L.Ed. 320, 324, 325; Neilson v Lagow, 12 How. (U.S.) 98, 13 L.Ed 909, 914. Significantly, in the latter two cases cited, there was no opinion issued in the State Court, yet the Court reviewed the record in those cases and found the asserted state grounds insufficient.

Appellee submits a review by this Court of the record will reveal the asserted state ground to be insubstantial.

Under the State Law it is clear the Oregon Court of Appeals decided the federal question.

In Oregon appeals of parental termination cases are reviewed de novo. State, ex rel, Juv. Dept. v Jones, 290 Or. 799, 810, 626 P.2d 882 (1981). When exercising de novo review the Oregon Appellate Courts are to make an independent study of the record and to exercise their independent judgment. Hannan v Good Samaritan Hosp., 4 Or.App. 178, 187, 188, 192, 471 P.2d 831, 476 P.2d 931 (1970), Sup. Ct. review denied (1971). The exercise of their judgment is, however, limited by the requirement in certain instances that weight be given trial court findings of fact. McCoy and McCoy, 28 Or.App. 919, 923, 562 P.2d 207 (1977). Here the general rule is weight must be given the trial court's findings any time the opportunity to see and hear witnesses is important and the amount of weight depends on the degree of importance. McCoy and McCoy, supra at 924. It was in recognition of this rule that the Oregon Supreme Court stated:

> (E)ven though the appellate court hears such a case de novo, it must, as a practical matter and as in other cases subject to de novo review, give considerable weight to the findings by the trial judge who had the opportunity to observe the witnesses and their demeanor in evaluating the credibility of their testimony. State, ex rel, Juv. Dept. v Jones, supra at 810.

The Oregon Court of Appeals has applied this rule in a parental termination case where no serious question was raised concerning the credibility of the fifteen witnesses at trial saying the case turned on an evaluation of the mother and an evaluation of the competence of the other witnesses to evaluate the mother. State, ex rel, Juv. Dept. v Maves, 33 Or.App. 411, 415, 416, 576 P.2d 828 (1978). The case at bar is strikingly similar to Maves, supra, in that it also turns on an evaluation of the mother and competency of the witnesses to evaluate the mother.

It must therefore be assumed the Court of Appeals, while exercizing de novo review, deferred to the Trial Judge's findings as was done in the Maves case, supra, when it affirmed without opinion. The lack of a written opinion does not change this conclusion for the Maves Court noted the Courts' intention, at the time, to cease issuing written opinions on de novo review of cases wherein the principle issue is factual and then said:

> (B)y affirming a decision without opinion in such a case we are merely stating that we have reviewed the record, weighed the evidence and concur in the decision of the trial court. State, ex rel, Juv. Dept. v Maves, supra at 413.

Nor does the Court's treatment of this case as one wherein the principle issue is factual mean it failed to decide the federal question. On the contrary, on the basis of the foregoing discussion and the following it is submitted the Court must necessarily have decided the federal question.

The Trial Court, in its findings, clearly stated the evidence was insufficient to support termination under a beyond a reasonable doubt standard. (pp. 15, 16, Appendix A, Jurisdictional Statement). The Trial Judge supported this finding by a lengthy discussion of the various witnesses and his evaluation of the evidence which they gave. (pp. 2-15, Appendix A, Jurisdictional Statement). Under the existing Oregon law the Oregon Court of Appeals would have been required to "give considerable weight" to the trial judge's finding. This fact, coupled with the fact that the Oregon Court of Appeals had previously decided the federal question herein in a fashion adverse to Appellant, (See In the Matter of K.M.S., 26 Or. App. 219, 552 P.2d 578 (1976)) leads to the inescapable conclusion that the Court did decide the federal question.

> If there is ambiguity whether the State decision is based on State or federal grounds, it is open to this Court to remand to the State Courts for clarification as to the grounds of the decision.

Although this Court will not review judgments resting on adequate state grounds, nevertheless, when the record is ambiguous but presents reasonable grounds to believe the judgment may rest on the decision of a federal question, it is open to this Court to remand the case to the State Court for clarification. Orr v Orr, 440 U.S. 268, 276, 59 L.Ed.2d 306, 317, 99 S.Ct. 1102; California v Kriuda, 409 U.S. 33, 34 L.Ed2d 45, 93 S.Ct. 32 (1972); Herb v Pitcairn, 324 U.S. 117, 126, 127, 89 L.Ed. 789, 65 S.Ct. 459 (1945); Dixon v Duffy, 342 U.S. 33, 96 L.Ed. 46, 72 S.Ct. 10 (1951).

Appellant submits this matter should be remanded if this Court finds the basis for the lower Court decision to be ambiguous for clarification by the State Court of the grounds for its decision.

CONCLUSION

For the reasons stated above the Court should deny Appellee's Motion to Dismiss or Affirm. Appellant requests the Court to note jurisdiction and consolidate this case with Santosky v Kramer, 80-5889.

Respectfully submitted,

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